THE EXPANDING SCOPE OF WARRANTLESS AUTOMOBILE SEARCHES: *UNITED STATES v. ROSS*

In United States v. Ross, *the United States Supreme Court upheld a warrantless search of a closed container transported in an automobile. This case represents a departure from the traditional rationales underlying the automobile exception to the warrant requirement. This Comment examines the justifications for expanding the scope of warrantless searches under the automobile exception, and contends that the stated rationales are not consistent with prior law and do not support the decision. This Comment also argues that the holding in* Ross *requires an abandonment of the expansion of warrantless searches under the search incident to arrest exception found in* New York v. Belton.

INTRODUCTION

In the last two decades, the United States Supreme Court has repeatedly confronted cases testing the permissible scope of warrantless searches.[1] The Court has consistently held that warrantless searches are reasonable only in "a few specifically established and well-delineated exceptions."[2] The rationale for this limited allowance of warrantless searches springs from the fourth amendment to the Constitution.[3] The fourth amendment

1. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); Katz v. United States, 389 U.S. 347 (1967); LaFave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire"*, 8 CRIM. LAW BULL. L. 9 (1972).

2. Katz v. United States, 389 U.S. 347, 357 (1967); *see* Comment, *The Automobile Exception: A Contradiction in Fourth Amendment Principles*, 17 SAN DIEGO L. REV. 933 (1980).

3. The fourth amendment to the United States Constitution reads:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

requires that searches must be reasonable to be valid.[4] The Court has said that the warrant requirement insures this reasonableness.[5]

Through the warrant requirement, the Court has recognized the important function served by a neutral and detached magistrate.[6] The magistrate checks overzealous police. Prior review of police action by the magistrate prevents some unjustified searches,[7] prevents hindsight from distorting the evaluation of the reasonableness of a search,[8] and reassures the public that the orderly process of law has been respected.[9] For these reasons, the Court has traditionally held that searches conducted without a warrant are per se unreasonable absent some overriding exigency.[10]

At the same time, this fourth amendment protection must be balanced against the responsibility of the police to investigate crime and apprehend criminals. The Court often finds itself distinguishing between shades of gray in balancing these sometimes competing values. In this effort, the Court has created much confusion for police and private individuals alike. To effectively balance these competing values, the Court has fashioned several exceptions to the fourth amendment warrant requirement.[11] Two of these exceptions, search incident to a lawful arrest and the movable vehicle exception, have been the subject of recent United States Supreme Court decisions.[12] The effect of these decisions is to expand police authority in making warrantless searches of automobiles.

In *New York v. Belton*[13] and *United States v. Ross*,[14] the Court set forth a new standard and justification for warrantless searches of automobiles. Justice Stevens, writing for the majority in *United*

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4. *Id.*

5. *E.g.*, Mincey v. Arizona, 437 U.S. 385, 390 (1978).

6. *See, e.g.*, Chambers v. Maroney, 399 U.S. 42, 51 (1970).

7. *See, e.g.*, United States v. United States District Court, 407 U.S. 297, 317 (1972).

8. *See, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 565 (1976).

9. United States v. Ross, 102 S. Ct. 2157, 2175 (1982) (Marshall, J., dissenting).

10. Mincey v. Arizona, 437 U.S. 385 (1978); Katz v. United States, 389 U.S. 347 (1967).

11. The exceptions can be illustrated with several cases: Michigan v. Tyler, 436 U.S. 499 (1978) (emergency circumstances); Chimel v. California, 395 U.S. 752 (1969) (search incident to a lawful arrest); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Schmerber v. California, 384 U.S. 757 (1966) (loss or destruction of evidence); Carroll v. United States, 267 U.S. 132 (1925) (movable vehicles).

12. New York v. Belton, 453 U.S. 454 (1981); and United States v. Ross, 102 S. Ct. 2157 (1982); respectively.

13. 453 U.S. 454 (1981).

14. 102 S. Ct. 2157 (1982).

States v. Ross,[15] implicitly created a "search pursuant to the automobile" exception to the warrant requirement.[16] This exception is based on the peculiarity of the automobile. The majority in *Ross* found that this peculiarity alone justifies an exception to the warrant requirement.[17]

This Comment argues that the United States Supreme Court has set forth a new exception to the warrant requirement and created a "bright-line" rule that will aid police officers in conducting searches of automobiles by simplifying, although not to the extent the Court had hoped, the law. This Comment also contends that the decision in *United States v. Ross* compels an abandonment of the rationale of *New York v. Belton*, a case decided only eleven months prior to *Ross*.[18] Regardless of the Court's stated rationale in *Belton*, the underlying premise was that articulated in *Ross*—the peculiarity of the automobile. As such, *Belton* foreshadows *Ross*, even though *Belton* was decided under the search incident to arrest exception rather than the movable vehicle exception. As a practical matter, all future cases involving warrantless searches of automobiles must be decided under *Ross*' newly created "search pursuant to the automobile" exception to the warrant requirement.

UNITED STATES V. ROSS

On June 1, 1982, the United States Supreme Court decided *United States v. Ross*. District of Columbia police, acting on an informer's tip that Ross was selling drugs from the trunk of his car, stopped Ross and asked him to get out of his vehicle. While the police were searching Ross, one of the officers noticed a bullet on the front seat. A pistol was found in the glove compartment during a search of the car and Ross was arrested and handcuffed. An officer then opened the trunk with Ross' keys and discovered a closed brown paper bag. He opened the bag and discovered small glassine packets of white powder, later found to be heroin.

15. *Id.*
16. *See infra* text accompanying notes 54-71.
17. *See infra* text accompanying notes 67-71.
18. The case of Robbins v. California, 453 U.S. 420 (1981), was explicitly overruled by United States v. Ross, 102 S. Ct. at 2172. *Robbins* was decided the same day as *Belton* (July 1, 1981), and, in fact, the Court commented on the remarkable similarity in the facts of the two cases. Robbins v. California, 453 U.S. at 444 (Stevens, J., dissenting).

The car was then taken to headquarters where another warrantless search of the trunk uncovered a brown leather pouch containing $3,200. The money and the heroin were admitted into evidence by the district court over the objection of the defendant's counsel. Ross was convicted, but the court of appeals reversed, disallowing the search of the pouch. The court of appeals then reheard the case en banc, and disallowed the search of the paper bag as well as the pouch.[19]

The United States Supreme Court reversed and held that police officers may conduct a warrantless search of the *entire* vehicle, including closed containers therein, to the extent that a magistrate could so authorize by warrant.[20] The only requirement for this warrantless search was that of probable cause to believe that the automobile contained contraband somewhere within it.[21] Because a warrant to search Ross' automobile would allow the officer to open any closed containers inside the automobile, the search of both the paper bag and the pouch were held to be permissible.[22]

United States v. Ross was an attempt by the Court to resolve a difficult area of fourth amendment law. The Court adopted a "bright-line" rule that increases the scope of warrantless searches of automobiles. In examining the rationales employed in cases using the movable vehicle exception prior to *Ross*, it becomes clear that the Court in *Ross* did not rely on those traditional justifications. Rather than basing the *Ross* holding on the exigency of mobility of the automobile[23] or the diminished expectation of privacy in the automobile,[24] the Court created a "search pursuant to the automobile" exception to the warrant requirement based solely on the peculiarity of the automobile.[25] This exception now justifies the warrantless search of closed containers found in automobiles.

Historical Background of the Movable Vehicle Exception

The movable vehicle exception was created in *Carroll v. United States*.[26] During prohibition federal agents stopped a car which informants had identified as carrying bootleg liquor. The agents

19. United States v. Ross, 655 F.2d 1159 (D.C. Cir. 1981) (en banc), *rev'd*, 102 S. Ct. 2157 (1982).
20. United States v. Ross, 102 S. Ct. at 2160-62.
21. *Id.* at 2164.
22. *Id.* at 2168.
23. *See* Carroll v. United States, 267 U.S. 132 (1925).
24. *See* United States v. Chadwick, 433 U.S. 1 (1977).
25. *See infra* text accompanying notes 54-71.
26. 267 U.S. 132 (1925).

searched the car and discovered sixty-eight bottles of gin and whiskey hidden inside the seat. The Supreme Court reasoned that an exception to the warrant requirement of the fourth amendment for a search of an automobile was appropriate when a law enforcement officer has probable cause to believe the vehicle contains contraband. This exception was deemed necessary because automobiles could be moved quickly from the jurisdiction before police could obtain a warrant.[27] This exigency was originally the only justification for the movable vehicle exception.

In 1970 the Court expanded the movable vehicle exception in *Chambers v. Maroney*.[28] Unlike *Carroll*, the automobile in *Chambers* was not searched immediately when it was stopped. Instead it was taken to the police station, impounded, and then searched. Although an exigency of mobility existed when the automobile was stopped, this was not true after it was at the station.[29] Nevertheless, the Court upheld the search on exigency grounds.[30]

The *Chambers* decision was justified, in retrospect, in *United States v. Chadwick*.[31] In *Chadwick* the Court stated that there was a diminished expectation of privacy in an automobile.[32] This diminished expectation, coupled with the "inherent" mobility of automobiles, justified the search at the station house in *Chambers*.[33] There is confusion in this area because the Court has not properly resolved the question of whether exigency or privacy grounds control the analysis of what constitutes a reasonable warrantless search.[34]

Automobiles and Closed Containers

The cases of *United States v. Chadwick*[35] and *Arkansas v. Sanders*[36] preceded *United States v. Ross* and held that closed containers in an automobile are not subject to warrantless

27. *Id.* at 149-50.
28. 399 U.S. 42 (1970).
29. *See* Comment, *supra* note 2, at 939-40.
30. *Id.* at 51-52.
31. 433 U.S. 1 (1977).
32. *Id.* at 12.
33. *See* Arkansas v. Sanders, 442 U.S. 753, 761 (1979).
34. For a discussion of the competing policies, and the interpretations of the fourth amendment from which they sprang, see Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47 (1974).
35. 433 U.S. 1 (1977).
36. 442 U.S. 753 (1979).

searches under the movable vehicle exception. Rather than allowing immediate warrantless searches of closed containers within automobiles suspected to contain contraband, the Court required law enforcement officers to seize the containers, obtain a warrant, and then conduct the search of the container. The rationale embraced was that an individual has a higher expectation of privacy in the container than in the automobile itself.[37]

In *Chadwick*, federal railroad agents became suspicious of a two-hundred-pound footlocker later found to be filled with marijuana. Narcotics agents met the train in Boston and tailed the footlocker until it was picked up by Chadwick and placed in the trunk of his car. The agents then seized the locker, transported it to a safe place, and opened it without a warrant. The Court examined the issue of whether closed containers in automobiles were subject to a warrantless search under the movable vehicle exception, and determined that neither exigency of mobility nor diminished expectation of privacy justifications for the movable exception—applied to closed containers in such automobiles.

The government argued that closed containers had the same type of mobility as automobiles, and should be subject to searches under the movable vehicle exception. The Court rejected this argument, saying that, "a person's expectations of privacy in personal luggage are substantially greater than in an automobile."[38] The Court also noted that the practical problems of storing seized automobiles are greater than those associated with storing seized luggage.[39] In *Chadwick* the Court was presented with both traditional justifications for the automobile exception: exigency of mobility and diminished expectation of privacy. It rejected both under the facts of the case. The Court did not state which justification it believed more forceful.[40]

Similarly, the Court in *Arkansas v. Sanders*[41] invalidated a warrantless search of a closed container in an automobile. The only factual difference between *Chadwick* and *Sanders* was that the automobile was moving in *Sanders*[42] and parked in *Chadwick*. The Court held this distinction insufficient to bring the *Sanders* search under the movable vehicle exception.

In *Sanders* the police received a tip that Sanders would be arriving at the Little Rock airport on a certain commercial flight with a green suitcase full of marijuana. The police staked out the

37. *See id.* at 762-65.
38. United States v. Chadwick, 433 U.S. at 13.
39. *Id.* at n.7.
40. *Id.* at 13.
41. 442 U.S. 753 (1979).
42. *Id.* at 755.

airport, and observed Sanders arrive as predicted with the green suitcase. Sanders and a companion put the suitcase in the trunk of a taxi and drove away. The police officer stopped the taxi a few blocks from the airport, opened the trunk and searched the suitcase—all without a warrant. The trial court allowed the seized marijuana into evidence, but the Arkansas Supreme Court reversed and held the search unlawful. The United States Supreme Court affirmed,[43] stating: "[T]he extent to which the Fourth Amendment applies to containers and other parcels depends not at all upon whether they are seized from an automobile."[44]

ROBBINS V. CALIFORNIA: Foreshadowing ROSS

In *Robbins v. California*[45] a divided Court held that the warrantless search of packages hidden in the tailgate wheelwell of a station wagon was unreasonable. A plurality said that Robbins had a reasonable expectation of privacy in the container. The rest of the Court remained unconvinced; clearly, the Court was dissatisfied with the traditional rationales and was perhaps searching for a new one.

A police officer stopped Robbins for driving erratically. The officer smelled marijuana smoke, searched the defendant and found a small vial of liquid. He next searched the interior of the car and found marijuana. He then opened the tailgate and removed the wheelwell cover, exposing two packages wrapped in green opaque plastic. The officer opened the packages and discovered a large quantity of marijuana in each.

The *Robbins* decision produced five opinions—none of which carried a majority.[46] The plurality held that the warrantless search of the packages was unreasonable. Relying on *Sanders*, the opinion focused on an individual's expectation of privacy in the contents of closed containers.[47] *Robbins* was a tenuous decision: the holding that a closed container in an automobile is protected from warrantless searches to the same extent as a

43. *Id.*
44. *Id.* at 764 n.13.
45. 453 U.S. 420 (1981).
46. The plurality opinion was delivered by Justice Stewart and joined by Justices Brennan, Marshall and White. Justice Powell filed an opinion concurring in the judgment. Justices Blackmun, Rehnquist and Stevens each filed dissenting opinions. Chief Justice Burger concurred in the judgment without joining any opinion.
47. 453 U.S. at 422-29.

container outside an automobile could only muster the support of four justices.[48] One of these justices, Justice Stewart, would be retiring at the end of the term. The three dissenting Justices—Justices Blackmun, Rehnquist, and Stevens—apparently agreed that a warrant should not be required to search a closed container in an automobile that can be searched under the automobile exception.[49] Two Justices remained: Chief Justice Burger concurred in the result but, inexplicably, did not join any opinion;[50] Justice Powell authored his own separate concurring opinion based on *Arkansas v. Sanders*.[51] Justice Powell did say, however, that he found the dissenters' contention "attractive."[52]

With the addition of Justice O'Connor as the potential swing vote, the situation was ripe for overruling *Robbins*, which is precisely the action taken by the Court in *United States v. Ross*.[53] After examining the traditional rationales for the movable vehicle exception, one is hard pressed to justify *Ross*.

A New Justification for Warrantless Searches of Automobiles

In an attempt to justify the *Ross* holding under traditional rationales, Justice Stevens stated that *Ross* is consistent with *Carroll* because both involved a probable cause search of a movable vehicle.[54] This belief, however, fails to consider that in *Carroll* the search was confined to the automobile itself, not closed containers within the automobile. Under the exigency of mobility justification, this is an important distinction.[55] Because containers can be removed from the vehicle, few of the practical problems inherent in seizing automobiles exist. When seizing an automobile, police usually have to make arrangements to return the driver and passengers to their homes.[56] The automobile is also such a pervasive part of society that depriving a person of the use of an automobile, even for a few days, may constitute a severe hardship.[57] Furthermore, the size of automobiles requires that a large amount of space be allocated by the police for storage of seized automobiles. This space is invariably outside, thus necessitating

48. *Id.* at 422.
49. Each, however, authored a separate dissent. *Id.*
50. *Id.* at 429.
51. *Id.*
52. *Id.* at 435.
53. 102 S. Ct. 2157 (1982).
54. 102 S. Ct. at 2159, 2169.
55. *See* United States v. Chadwick, 433 U.S. at 13.
56. *See* Chambers v. Maroney, 399 U.S. 42 (1970).
57. *Id.* at 51.

security arrangements as well.[58]

The problems associated with the exigency of mobility for automobiles do not exist for closed containers. Closed containers are much easier to store and can be easily seized and transported. Also, an individual can surrender his luggage to the police and then go about his business more easily than if his automobile is seized.[59] In short, the exigency of mobility that justifies a warrantless search of an automobile cannot support the warrantless search of a closed container—even if that container is carried inside an automobile.[60]

Neither can the holding in *Ross* be explained by reference to the second justification employed in the movable vehicle exception: the diminished expectation of privacy. This rationale can be found in *United States v. Chadwick*.[61] The *Chadwick* Court stated that a significant expectation of privacy exists in closed containers that does not exist in automobiles.[62] *Ross*, however, stated that the fourth amendment protection of containers can vary in different settings.[63] Justice Stevens listed three situations in which a closed container may be searched. In a border search the government's interest in policing its border allows intrusion into the individual's privacy without a warrant.[64] The second example is a search incident to arrest. Here the preventive self-defense of the police and the interest in protection against loss of evidence allow a warrantless search.[65] The third example is a search under a warrant.[66] The *Ross* Court's attempt to equate these allowable searches with a "search pursuant to the automobile" exception ignores the privacy claim and appears to create a new warrantless search exception. Rather than justifying the *Ross* holding based on the exigency of mobility of an automobile or the diminished expectation of privacy in an automobile, the

58. 102 S. Ct. at 2163 n.9. Considerations such as these led the Court in *Chambers* to refrain from deciding which was the greater intrusion on the individual: the warrantless search of his or her automobile, or the seizure of the automobile while awaiting a warrant. Chambers v. Maroney, 399 U.S. 42, 51-52 (1970).

59. *Cf.* Chambers v. Maroney, 399 U.S. at 52 (seizure of automobile results in no one being able to use it until a warrant is obtained).

60. United States v. Ross, 102 S. Ct. at 2163.

61. 433 U.S. 1 (1977).

62. *Id.* at 13.

63. 102 S. Ct. at 2171.

64. *See, e.g.*, Henderson v. United States, 390 F.2d 805 (9th Cir. 1967).

65. *See infra* text accompanying notes 90-99.

66. *See supra* text accompanying notes 6-10.

Court created a "peculiarity of the automobile" exception to the warrant requirement. This exception now justifies the warrantless search of closed containers found in automobiles when an officer has probable cause to believe contraband is present somewhere in the automobile. While the Court viewed traditional justifications as valid considerations, *practical* considerations served as the underlying rationale in *Ross*. The Court was persuaded by the argument that an automobile should receive special consideration.[67] Automobiles are extremely prevalent in society.[68] There is also much contact of various types between police and individuals in automobiles.[69] This new rationale, espousing the peculiarity of the automobile, simplifies police work by allowing more warrantless searches.[70] This practical consideration weighed heavily in the Court's decision, because many incidents between police and individuals involve contraband hidden in automobiles.[71]

Unanswered Questions in Ross

In *Ross* Justice Stevens distinguished *Chadwick* and *Sanders* by stating that a warrant is required when police have probable cause to believe the container conceals contraband *before* it is placed in an automobile.[72] This was the situation in both *Chadwick* and *Sanders*. In *Ross*, however, such probable cause did not exist until *after* the officers began to search the car. Despite Justice Stevens' intentions, this distinction may result in serious difficulties for police officers as well as judges in applying *Ross* to future cases.

In both *Chadwick* and *Sanders* the Court held that a warrantless search of a closed container inside an automobile was not subject to the movable vehicle exception.[73] These cases seem to contradict *Ross*, since the Court in *Ross* held that closed contain-

67. 102 S. Ct. at 2164.
68. *Id.* at 2161.
69. *Id.*
70. *See id.* at 2172-73. Of course, the possibility always exists that the warrantless search can be lawfully conducted under one of the other exceptions to the warrant requirement. *See supra* note 11.
71. 102 S. Ct. at 2161.
72. *Id.* at 2166-67. The Court also settled an issue left unsettled since Arkansas v. Sanders, 442 U.S. 753 (1979). Note 13 of *Sanders* stated: "[N]ot all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment." 442 U.S. at 764 n.13. *Ross* holds that this applies solely to containers that, by their shape or appearance, reveal their contents. Examples are a gun case or a kit of burglary tools. 102 S. Ct. at 2171. *Ross* specifically rejects the contention that there is a constitutional distinction between "worthy" and "unworthy" containers. 102 S. Ct. at 2165-68.
73. *See supra* text accompanying notes 35-44.

ers in any compartment of an automobile may be searched without a warrant. Justice Stevens, however, explained *Chadwick* and *Sanders* in an attempt to reconcile them with *Ross*.[74] Neither case, he states, is really an automobile exception case: "[T]he relationship between the automobile and the contraband was purely coincidental . . . ."[75] That is, police had probable cause to believe the container concealed contraband *before* it was placed in the automobile. An individual has a greater expectation of privacy in closed containers than in automobiles.[76] Because of this, probable cause alone is not enough to justify a warrantless search of closed containers only incidentally connected with automobiles.[77]

Justice Stevens' attempt to reconcile *Ross* with *Chadwick* and *Sanders* may cause difficulties. In practice, will a police officer state that he or she had probable cause regarding the closed container or regarding the entire automobile? There is ambiguity involving the probable cause time limit: when does an officer's probable cause as to a container preclude a warrantless search? The decision leaves other questions unanswered. When does a police officer's probable cause belief that a particular container holds contraband foreclose a warrantless search of that container if it is in an automobile? Under *Chadwick* and *Sanders*, probable cause formed prior to the container's placement in the automobile requires a warrant.[78] What would be the result, however, if probable cause was formed after the container was placed inside the vehicle but before a search of the vehicle had begun? One may envision a hypothetical based loosely on the *Ross* situation in which a police officer receives a tip that the suspect is selling heroin out of his car in brown paper bags. The police officer approaches a car matching the description of the suspect's car and observes a large quantity of identically shaped brown paper bags, all on the passenger seat and sealed. At this point does the officer have probable cause as to the bags? Does he or she need a warrant to open those bags? *Ross* does not address these questions.

74. 102 S. Ct. at 2165-68. However, Justice Stevens admitted that *Ross* "rejected some of the reasoning in *Sanders*." *Id.* at 2172.

75. *Id.* at 2167 (quoting Arkansas v. Sanders, 442 U.S. 753, 767 (1979) (Burger, C.J., concurring)).

76. *See* United States v. Chadwick, 433 U.S. 1, 13 (1977).

77. 102 S. Ct. at 2167.

78. *Id.*

The holding in *Ross* tends to reward ignorant police officers. The police can search a container without a search warrant if they can "show that the investigating officer knew enough but not too much, that he had sufficient knowledge to establish probable cause but insufficient knowledge to know exactly where the contraband was located."[79] Will a police officer remain intentionally ignorant to conduct a warrantless search of an automobile? The temptation is there.

The decision in *Ross* poses further problems. The majority ignores the value of review by a detached and neutral magistrate.[80] A tenet of fourth amendment protection is that a search authorized by a warrant is always preferred.[81] *Ross* also fails to address whether the holding will be applied to vehicles other than automobiles[82] or to parked automobiles.[83]

New York v. Belton: Justifying an Expanded Search of Automobiles Prior to *Ross*

Eleven months prior to *United States v. Ross*, the United States Supreme Court decided *New York v. Belton*.[84] *Belton* demonstrates the Court's dissatisfaction with previous decisions dealing with the search of containers in automobiles. As such, *Belton* foreshadows *Ross* by implicitly holding that the presumptive burden on the police justifies a warrantless search of automobiles. The Court explicitly justified *Belton* under the search incident to arrest exception. However, similar to the problem in *Ross*, tradi-

79. United States v. Ross, 655 F.2d 1159, 1202 (D.C. Cir. 1981) (en banc) (Wilkey, J., dissenting), *rev'd*, 102 S. Ct. 2157 (1982).

80. *See* 102 S. Ct. at 2173-74 (Marshall, J., dissenting).

81. *See, e.g.*, Mincey v. Arizona, 437 U.S. 385 (1978); Katz v. United States, 389 U.S. 347 (1967); Arkansas v. Sanders, 442 U.S. 753, 760 (1979) ("[T]he few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and the 'burden is on those seeking the exemption to show the need for it.' "); *see also* Johnson v. United States, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Id. at 13-14.

82. The peculiarity of the automobile, by definition, casts doubt on such an expansion to vehicles such as airplanes. *See supra* text accompanying notes 67-71.

83. Justice Marshall states in his dissent: "The Court confines its holding today to automobiles stopped on the highway which police have probable cause to believe contain contraband. I do not understand the Court to address the applicability of the automobile exception rule announced today to parked cars." 102 S. Ct. at 2174 n.1 (Marshall, J., dissenting) (citations omitted).

84. 453 U.S. 454 (1981).

tional search incident rationales do not support *Belton*—contrary to what the Court states.

On April 9, 1978, a state trooper stopped an automobile for speeding on a New York thruway. There were four men in the car, including Roger Belton. The officer discovered that none owned the car and saw an envelope on the floor labeled "Supergold." He also smelled a distinct odor of marijuana.[85] Based on these facts the officer ordered the men from the car and arrested them for unlawful possession of marijuana. Each suspect was then searched and placed at a different location around the outside of the car. The officer discovered cocaine in the back seat of the car inside a zippered pocket of Belton's jacket. At trial Belton moved to suppress the cocaine. The trial court denied the motion and Belton pleaded guilty to a lesser included offense but preserved his right for appeal. The appellate division affirmed but the New York Court of Appeals reversed. The United States Supreme Court granted certiorari.[86]

The Supreme Court reversed and upheld the search of the jacket. Justice Stewart delivered the opinion of the Court, holding that in a search incident to a lawful custodial arrest,[87] the police can search the entire passenger compartment of an automobile including the glove compartment, but not the trunk.[88] The trunk was excluded because it was not within the ordinary reach of a passenger and therefore not justifiable under the traditional search incident to arrest exception and its rationale.[89]

Historical Background of the Search Incident to Arrest Exception

The Court's use of the search incident to arrest exception to justify the *Belton* result is problematic because *Belton* cannot be justified under traditional search incident rationales. A new ra-

85. *Id.* at 455-56.

86. People v. Belton, 50 N.Y.2d 447, 407 N.E.2d 420, 429 N.Y.S.2d 574 (1980), *rev'd*, 453 U.S. 454 (1981).

87. The use of the word "custodial" injects ambiguity into the *Belton* holding. The Court failed to explain whether or not it intended "custodial arrest" to mean something other than "ordinary arrest." Justice Stevens, in his dissenting opinion in *Robbins* can find no difference of constitutional significance between the two terms because "[a]ny person lawfully arrested for the pettiest misdemeanor may be temporarily placed in custody." Robbins v. California, 453 U.S. at 450 (Stevens, J., dissenting).

88. United States v. Belton, 453 U.S. at 460 n.4.

89. *Id.* at 460.

tionale must therefore be found or the search incident exception must be redefined.

The landmark case of *Chimel v. California*[90] provides the basis for the search incident to arrest exception to the warrant requirement. In *Chimel* the Court defined the scope of a search incident to an arrest to include the suspect's person and the area within his immediate control.[91] "Immediate control" was defined as the area from which the suspect might obtain a weapon or destroy evidence.[92] The Court reasoned that this limited search was sufficient to ensure protection of the officer and preservation of evidence.[93]

United States v. Robinson[94] further defined the search incident to arrest exception. *Robinson* held that even if the arrest was for a traffic violation and the subsequent search therefore would not be for weapons or evidence of a particular crime, the police may make a warrantless search of the suspect's person, including any closed container *found on* that person.[95] The justification for the scope of the search including evidence or weapons not related to the crime for which the suspect was arrested was the act of the lawful arrest itself.[96] This justification is rooted in the "general authority" to search incident to arrest.[97] Because the lawful arrest of the individual is a reasonable intrusion on his fourth amendment rights, the subsequent search of his person, being a lesser intrusion, would not pass any benefit to the individual if a warrant were required.[98] Therefore, a warrant is not necessary because the greater privacy right already has been forfeited.[99]

A New Justification in Belton

The *Belton* Court attempted to reconcile its holding with traditional search incident rationales. Justice Stewart stated that the holding in *Belton* is justified under the search incident to arrest exception because articles within a passenger compartment of an automobile are "generally, even if not inevitably," within the immediate control of the suspect.[100] But this is simply not true under the facts of *Belton*. For Belton, under arrest outside the

90. 395 U.S. 752 (1969).
91. *Id.* at 763.
92. *Id.*
93. *Id.*
94. 414 U.S. 218 (1973).
95. *Id.* at 236.
96. *Id.* at 235.
97. 2 W. LAFAVE, SEARCH AND SEIZURE § 5.2, at 265 (1978).
98. *Id.* at 263.
99. *See id.* at 262-70.
100. New York v. Belton, 453 U.S. at 460.

automobile, to reach inside the automobile and unzip the pocket of a jacket in the backseat, he would need "the skill of Houdini and the strength of Hercules."[101] The Court in *Belton* chose to abandon a case-by-case analysis in favor of a "bright-line" rule which maintains that the inside of an automobile is *always* within the reach of a suspect.[102] But this flatly contradicts the *Chimel* rationale which was based on an analysis of the area a suspect could actually reach, and not the parameters defined by an office, a home, or the interior of an automobile.[103]

Nor can *Belton* be justified under the Court's rationale in *Robinson* which focused on the suspect's reduced expectation of privacy after arrest.[104] *United States v. Chadwick*[105] addressed the issue of searches of closed containers during a search incident to arrest. Applying *Chimel*, the Court in *Chadwick* stated that if a container not on the immediate person was reduced to the control of the police it could not be opened without a warrant.[106] The rationale was that an individual retains an expectation of privacy in closed containers that is not extinguished by the intrusion of the arrest.[107] Therefore, alternatives available to the police, such as seizure, were preferable to a warrantless search.[108] The *Belton* holding cannot be justified under the *Robinson* rationale of reduced expectation of privacy because under *Chadwick* and *Sanders*, an individual has a high expectation of privacy in closed containers.[109] Because the container was under the policeman's exclusive control,[110] *Chadwick* requires that a warrant be obtained. Yet, the Supreme Court allowed the warrantless search in

101. United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973) (Goldberg, J., dissenting).

102. New York v. Belton, 453 U.S. at 458.

103. Chimel v. California, 395 U.S. at 762-63.

104. United States v. Robinson, 414 U.S. at 235.

105. 433 U.S. 1 (1977).

106. *Id.* at 15.

107. *Id.* at 16 n.10.

> Unlike searches of the person, United States v. Robinson, 414 U.S. 218 (1973); United States v. Edwards, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest. [Chadwick's] privacy interest in the contents of the footlocker was not eliminated simply because [he was] under arrest.

Id.

108. 433 U.S. at 13.

109. *See supra* text accompanying notes 36-44.

110. The New York Court of Appeals found that, under the facts in *Belton*, the police officer had gained exclusive control of Belton's jacket by searching it and

Belton. The only reasonable explanation for the Court's decision is the rationale later found implicit in *United States v. Ross*.[111]

The *Belton* rationale unjustifiably expands the search incident to arrest exception. This expansion cannot be justified because the facts in *Belton* directly contradict the essence of *Chimel*—that the search be related to preventive self-defense or preservation of evidence. The practical effect of such expansion is dangerous.

Allowing police officers to search the entire passenger compartment and closed containers therein may not always be necessary to preserve evidence and protect the officer's safety: such a "bright-line" rule invites serious invasion of areas and articles in which an automobile occupant has a high expectation of privacy.

Furthermore, this rule could result in a police officer manufacturing grounds for arrest. Under *Belton*, an officer may legally stop an automobile for a minor offense such as speeding and place the driver under arrest for the sole purpose of conducting a thorough search of the car—a search for which no probable cause exists. These so-called "pretextual arrests" could increase under *Belton* since the scope of a search incident to such an arrest is much broader than that afforded by both the pre-*Ross* movable vehicle exception and the pre-*Belton* search incident to arrest exception. However, greater danger of pretextual arrests exists under *Belton* because probable cause to believe that contraband is located in the automobile is not required to conduct a warrantless search.

Furthermore, the *Ross* exception is based on the peculiarity of the automobile, and therefore, the rules governing searches of automobiles are distinct from rules governing other types of warrantless searches. Given this premise, all searches involving automobiles must be resolved under this exception to preserve a consistent application of fourth amendment principles. Thus, the holding in *Belton* not only foreshadows *Ross*, it should more properly be seen as an exercise of the "search pursuant to the automobile" exception.

Consequently, the search incident to arrest exception should be narrowly construed, and its dangerous expansion in *Belton* should be overruled. The reasonableness of all full-scale automobile searches should instead be governed by *Ross*, which requires probable cause to believe contraband is located in the vehicle. Although the *Ross* expansion increases police power to conduct warrantless searches and, arguably, correspondingly increases

seizing the contents of the pocket. 50 N.Y.2d 447, 451; 407 N.E.2d 420, 422; 429 N.Y.S.2d 574, 577 (1980), *rev'd*, 453 U.S. 454 (1981).

111. *See supra* text accompanying notes 67-71.

the potential for abuse of individual rights, it is preferable to the expansion of the search incident to arrest exception found in *Belton*.

CONCLUSION

United States v. Ross held that police officers may search an entire automobile, including closed containers therein, without a warrant if they have probable cause to believe the automobile contains contraband.

Due to the widespread use of automobiles, the large number of police/automobile confrontations, and the propensity of criminals to hide contraband in automobiles, the Court has implicitly created an exception to the warrant requirement. This exception—a "search pursuant to the automobile" exception—finds its justification in the peculiarity of the automobile itself and rejects the traditional rationales behind the movable vehicle exception. The new rationale is not based on any single aspect of the automobile, such as mobility or privacy, but rather on the practical nature of a search of the automobile. Therefore, the scope of the search in *Ross* is not contingent on any one factor. Instead, the warrantless search is allowed solely because an automobile is involved. A warrant is required if there is no automobile or if the closed container is only "incidentally" connected to the automobile.

The Court's holding in *Ross* yields positive and negative results. The Court has simplified the police officer's job by allowing an entire automobile to be searched any time there is probable cause to believe that it contains contraband. It may also be argued that police officers who have valid probable cause to believe that contraband is hidden in an automobile should not be denied the efficiency of an on-the-spot search of the entire car, including closed containers in which the contraband is likely to be concealed. However, efficiency is not an interest which justifies the dismissal of an individual's fourth amendment rights.[112]

The "search pursuant to the automobile" exception is far-reaching in its effect. It compels an overruling of the rationale in *New York v. Belton*. *Belton*, like *Ross*, cannot be supported by

112. "Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution. Is not a dictatorship the most 'efficient' form of government?" United States v. Ross, 102 S. Ct. at 2181 n.13 (1982) (Marshall, J., dissenting).

traditional rationales. Since *Belton* can be seen as foreshadowing *Ross*, and because the "search pursuant to the automobile" exception must logically encompass all searches involving automobiles, *Belton* must be analyzed in accordance with *Ross*. Therefore, the rationale in *Belton* relying on the search incident to arrest exception must be rejected in favor of a rationale consistent with the "search pursuant to the automobile" exception based on the peculiarity of the automobile.

While the holding in *United States v. Ross* may sometimes result in unjustifiable searches, it at least requires probable cause prior to the full-scale search of an automobile. The potential for abuse of the individual's fourth amendment rights is much greater if the rationale of *New York v. Belton* is not rejected and replaced with a justification consistent with the probable cause requirement of the "search pursuant to the automobile" exception.

KIRK MILLER